

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 98-379

Decided April 16, 2001

Appeal from a decision of the Richfield (Utah) District Manager, Bureau of Land Management, to implement the Normal Year Fire Rehabilitation Plan and Emergency Fire Rehabilitation Plan. EA No. J-050-097-072.

Affirmed.

1. Administrative Authority: Generally--Appeals: Jurisdiction--Federal Land Policy and Management Act of 1976: Land-Use Planning--Rules of Practice: Appeals: Jurisdiction

The Board has no jurisdiction to review a BLM decision that there will be fire rehabilitation when that decision was made within the context of a land use plan. Therefore, BLM need not consider a no-action alternative when it concludes that alternative is not in conformance with approved land use plans. However, the Board has jurisdiction to review a BLM decision implementing the rehabilitation plan.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

A BLM decision to implement a fire rehabilitation plan will be affirmed where the appellant fails to establish that BLM did not adequately consider matters of environmental concern. The party challenging a BLM decision has the burden of showing by objective proof that the determination was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion or disagreements do not suffice to establish that BLM's analysis is inadequate.

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE KELLY

Southern Utah Wilderness Alliance (SUWA) has appealed a May 13, 1998, Decision Record (DR) and Finding of No Significant Impact (FONSI) of the Richfield (Utah) District Manager, Bureau of Land Management (BLM) to implement the proposed action of the Normal Year Fire Rehabilitation Plan (NFRP) and Emergency Fire Rehabilitation (EFR). The DR/FONSI was based on Environmental Assessment (EA) No. J-050-097-072 and was contingent on meeting certain stipulations.

The NFRP/EFR is a 10-year plan intended to "streamline the EFR procedures to enable on-the-ground treatments to be completed in the Richfield District within time frames that are consistent with the urgent nature of fire rehabilitation." (EA at 1.) It does not establish a response to any particular situation but contains information on areas where fires are most likely to occur, what type of rehabilitation treatments are needed, and the impacts of rehabilitation practices and measures. The NFRP/EFR establishes criteria for the method of seeding and the type of seed to be used as well as erosion and sediment control structures, fencing, cultural resource consultation, and livestock control. The purpose and need of the NFRP/EFR is to reduce the repetitive preparation of individual rehabilitation plans thereby saving time and cost and allowing for timely implementation of EFR projects.

After each fire an NFRP supplement would be prepared with additional National Environmental Policy Act (NEPA) documentation that describes the site-specific rehabilitation actions to be taken. Each of the supplements would be tied to the NFRP/EFR and the EA, as well as the Final Environmental Impact Statement, the Vegetation Treatment on BLM Lands in Thirteen Western States (May 1991), and the Utah Record of Decision dated July 1991. The additional NEPA documentation would include "a discussion of the fire; the resources damaged by the fire; the proposed rehabilitation practices to be implemented; impacts not discussed in the EA; applicable project stipulations; and financial requirements." (EA at 1.) In addition, archeological and threatened, endangered and sensitive species clearances would be done prior to any surface disturbances taking place.

In its Statement of Reasons (SOR), SUWA asserts that the requirement of additional NEPA documentation would frustrate the stated purpose of the EA to streamline the rehabilitation process. It contends that the Richfield District encompasses a vast and diverse landscape with at least nine distinct plant communities but that BLM has prepared an assessment that applies to no place in particular. (SOR at 4.)

SUWA argues that the EA is legally inadequate because it fails to provide any contrast to the possible results of taking no action, whereas the "primary mandate of NEPA requires that an agency consider all environmental impacts of a proposed project and alternatives to the project, before making a decision." (SOR at 5 citing 42 U.S.C. §§ 4332(C), 4332(E) (1994).) It maintains that without considering the effects of the no-action alternative it is impossible to determine that the results of taking action are preferable. SUWA insists that while the EA mentions the

no-action alternative it was not considered because it was deemed to not be in "conformance with existing Bureau policy and the applicable land use plans." It also asserts that the Warm Springs and House Range Resource Management Plans (RMPs) to which the EA refers do not discuss fire rehabilitation beyond saying that rehabilitation would be conducted in accordance with a Richfield District NFRP. This, SUWA contends, creates a circular model with the RMPs referring to a future NFRP and the NFRP referring back to the RMPs. SUWA complains that BLM has avoided any analysis or discussion of the no-action alternative by using this circular model. (SOR at 6.)

SUWA also asserts that BLM has failed to provide a rational basis for its conclusion that drilling and chaining <sup>1/</sup> are the most desirable methods of fire rehabilitation and that this failure is a violation of NEPA. SUWA maintains that while the EA states that aerial seeding is successful only 10 to 15 percent of the time, there is nothing in the EA to provide a basis for this. It also avers that BLM does not provide an assessment of the success rate of chaining. Furthermore, it complains that the source of predictions about the success rate of chaining is not provided so it is not known if the study relied on is relevant to the project area or if there is any basis for concluding that chaining leads to success when compared with unchained areas. SUWA also raises the possibility that chaining may deter revegetation by placing seed too far below the ground surface for germination. (SOR at 8.)

Another problem SUWA finds with the practice of chaining is that it finds chaining to be aesthetically unpleasant charging that it transforms the landscape into a battered field, with fractured tree limbs in unnatural twisted heaps. It contends that the areas are robbed of their original character and transformed into livestock feeding grounds which over time could affect the integrity of wilderness study areas (WSAs) and wilderness-eligible areas.

SUWA also complains that the discussion in the EA of the cumulative effects is inadequate because it simply concludes that "long-term productivity of watershed and rangeland values would be protected." (SOR at 9, quoting EA at 13.) Thus, it maintains BLM has failed to meet its obligation to consider cumulative effects of fire rehabilitation measures. In particular, SUWA contends that the EA did not discuss mitigative measures for cultural resources and asserts that this omission leaves important questions regarding the cumulative impacts unanswered. SUWA asserts that BLM failed to consider that the practice of avoiding archeological sites during chaining makes the sites obvious to looters and also attracts livestock to the remaining areas of shade where they trample and destroy

---

<sup>1/</sup> Drilling is planting seeds in a manner similar to that used by farmers to plant crops in the field. Chaining involves the rolling of a large naval ship anchor chain between two large bulldozers to cover aerial seeding. (BLM Answer at 3.)

artifacts and information. Further, it argues that BLM contractors pulling down trees with chains are unlikely to recognize scatters of prehistoric potsherds and lithic artifacts. (SOR at 10.)

Finally, SUWA challenges the plan's approval of seeding of non-native species. SUWA asserts the EA failed to consider the possible cumulative adverse impact of the use of non-native seeds over time and how altering the vegetation could affect survival rates among native wildlife which might face encroaching competition from cattle and sheep in a land converted to pasture.

In its answer, BLM asserts that the NFRP is essentially the same as the plan it replaces, which was adopted in 1988. It contends the plan is just a plan and does not establish what BLM will do in response to any particular situation where rehabilitation is required. BLM maintains that the plan recognizes that where an area covered with perennial grasses burns, its first response is to do nothing, to see whether the perennial grasses will recover without the necessity for further treatment. However, BLM avers that when a pinion juniper forest burns, it is not replaced by another pinion juniper forest if nothing is done, but instead is usually replaced by annual grasses, particularly cheatgrass, "which is not particularly good forage for either wildlife or cattle, and which dies quickly and becomes extremely dangerous fuel in the late summer for another range fire." (Answer at 2.) BLM argues that in that situation its purpose is to alter the fire cycle by establishing a regime of perennial grasses which do not dry out and become fuel for range fires. Moreover, it maintains that such grasses have a tendency to recover on their own and provide better habitat for wildlife and better forage for livestock grazing, whereas when cheatgrass burns the top soil is blown away, creating a serious problem of wind erosion.

BLM asserts that there are three stages in rehabilitating burned areas of pinion juniper. The first stage is to drill seeds from perennial plants where that is possible. Where drilling is not possible, BLM aerially seeds the area and then chains it to cover the seeds and increase the probability they will germinate. If the terrain cannot be chained then it is aerially seeded only, but BLM contends that in its experience that is the least successful method. (Answer at 3.) However, before chaining or drilling is undertaken an archeological survey is conducted and "any areas identified as containing archeological value are flagged and avoided by any such effort." (Answer at 4.)

BLM contends it has explained a rational basis for its conclusion that drilling and chaining are the most desirable methods of fire rehabilitation. It argues that the decision to use drilling and chaining reflects the previous policies of the Richfield District contained in the 1988 Fire Rehabilitation Plan and therefore SUWA is too late to challenge the appropriateness of those methods. Moreover, BLM asserts that SUWA is trying to substitute its views for those of BLM but has presented no scientific evidence for its view whereas BLM has many years of experience with Fire Rehabilitation. (Answer at 5.)

In response to SUWA's contention that it did not consider a no-action alternative, BLM argues that it considered such an alternative and concluded it would be inconsistent with BLM policy and the applicable land use plans which specifically found that fire rehabilitation would be conducted after range fires. (Answer at 4, citing Warm Springs RMP at 61-62; House Range RMP at 94.) BLM points out that this Board has held that it has no jurisdiction to review land use planning decisions such as the one at hand, and asserts that the determination to engage in fire rehabilitation is not appealable. (Answer at 4.)

Finally, BLM asserts that the EA did consider the cumulative impacts of the proposed action when it considered the effect of additional fires. It argues that the NFRP/EFR is just a plan, that it does not affect any particular land. The purpose of the plan is to streamline BLM's response because there is only a short period of time during which rehabilitation can be done and that occurs between the melting of snow and the drying up of desert land. However, additional NEPA documents would be prepared for each site specific rehabilitation and at that time further cumulative impact analysis would be made.

[1] SUWA argues the BLM failed to consider a no-action alternative and thus violated NEPA. BLM counters that a no-action alternative would not be in conformance with the various RMPs and Management Framework Plans because they state that fire rehabilitation would be conducted in accordance with the NFRP and a no-action alternative would mean that there would be no NFRP. As BLM correctly states this Board has no jurisdiction to review land use planning decisions. As a general matter, the Board of Land Appeals has the authority to review all decisions by BLM related to the use and disposition of the public lands. 43 C.F.R. § 4.1(b)(3); see 43 C.F.R. § 4.410(a). However, the Board does not have jurisdiction to substantively review decisions to approve or amend resource management plans, including land use plans as described by the Federal Land Policy and Management Act of 1976, which "are designed to guide and control future management actions." 43 C.F.R. § 1601.0-2. Max Wilson, 131 IBLA 306, 308 (1994) and cases cited therein. Since adoption of such a plan is to establish general management policy rather than to implement decisions that affect specific parcels of land, approval of a plan is subject only to protest to the Director, BLM, whose decision is final for the Department. Id. See Colorado Environmental Coalition, 130 IBLA 61, 65 (1994); The Wilderness Society, 109 IBLA 175, 178 (1989); 43 C.F.R. § 1610.5-2. Thus, the decision that there would be a fire rehabilitation plan is a management policy outside the Board's purview.

SUWA complains that BLM's argument leads to a circular model with the RMPs stating there will be a plan and the plan stating that a no-action alternative is inconsistent with the RMPs. It argues that the RMPs merely state that after a wildfire rehabilitation will be conducted in accordance with the Richfield District NFRP and that BLM has used this to avoid any analysis or discussion of the no-action alternative. However, the land use plans state there will be rehabilitation and the purpose of the NFRP/EFR is to determine the type of rehabilitation. Thus a no-action alternative under which there would be no rehabilitation would be contrary to the land

use plans. While the end result is that BLM has not considered the no-action alternative, the matter is not within the Board's jurisdiction because BLM made the determination that there would be rehabilitation after a fire within the context of land use planning.

However, the Board does have jurisdiction to review the fire rehabilitation plan itself because it makes specific decisions rather than general management policy and those decisions will be applied to specific parcels of land. Examples of these decisions are establishing criteria for seeding, erosion and sediment control structures, and fencing. (EA at 3, 5).

[2] A party challenging a BLM rehabilitation plan bears the burden of demonstrating error in BLM's actions. The Ecology Center, 147 IBLA 66, 71 (1998). Such error must be alleged with reasonable particularity and supported by objective proof. Id. BLM's decision will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant effects will occur is reasonable in light of the environmental analysis. See, e.g., Bill Armstrong, 131 IBLA 349, 350 (1994); G. Jon and Katherine M. Roush, 112 IBLA 293, 297 (1990). The party challenging the determination has the burden of showing by objective proof that it was premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. G. Jon and Katherine M. Roush, *supra*, at 298.

Moreover, mere differences of opinion do not suffice to establish that BLM's analysis was inadequate. Friends of the Bow, 139 IBLA 141, 147 (1997). In this case, SUWA differs with the EA's assertion that if drilling is not feasible, aerial seeding should be followed by chaining (SOR at 7, citing EA at 3, 10), and maintains that the EA does not provide a basis for the conclusion that aerial seeding alone is successful only 10 to 15 percent of the time. The EA states that the success of seeding sown by rangeland type drills is usually 80 to 95% whereas the success of seed that has been broadcast or aurally seeded and not covered by soil is 10 to 15%. (EA at 10.) BLM asserts that these figures are based on experience. (Answer at 3.) While SUWA challenges those percentages it has not shown that they are in error. As a general rule we will not substitute our judgment for that of the experts employed by the Department to analyze the facts and to make recommendations in their particular fields of expertise, in the absence of a showing that the decision is contrary to the evidence of record or otherwise arbitrary or capricious. National Organization for River Sports, 138 IBLA 358, 363 (1997). No such showing has been made in this case.

Further, SUWA asserts that BLM failed to consider the cumulative impacts of fire rehabilitation. However, it is impossible to consider the cumulative impact as to a particular parcel of land because rehabilitation is only needed when there is a fire and it is impossible to determine in advance whether an area will ever have a fire or be repeatedly burned over the life of the NFRP/EFR. Thus, the cumulative impacts examined by the EA

resulted in a general conclusion that multiple fires in the same area would result in "less native vegetation to serve as a seed source for the burned area, and to provide cover for wildlife species." (EA at 12-13.) The EA also concluded that "immediate action to rehabilitate burned areas would help assure that long-term productivity of watershed and rangeland values would be protected. Because many seeded species are fire tolerant and/or fire resistant and stay green longer, the seeding areas would act as natural fire breaks for future fires." (EA at 13.) SUWA has shown no error in these conclusions, but simply argues that there will be negative impacts from drilling and chaining. It ignores the EA's conclusions that there will be negative impacts from a fire. These negative impacts included erosion (because the soil would be exposed to wind), loss of watershed cover which could result in deterioration of water quality, an increase in run-off and sediment yield, and a deterioration in air quality brought about by wind-blown dust. (EA at 10.) Thus, SUWA simply has a different opinion as to the severity of impacts.

SUWA also argues that BLM has failed to consider the impact 10 years of chaining projects could have on cultural resources. However, the EA requires archeological clearances prior to any surface disturbing activities taking place. BLM will consult with both the Utah State Historic Preservation Officer and the appropriate Native American Groups prior to any rehabilitation. (EA at 4, 9, 12.) Thus, before there is any chaining BLM will attempt to discover areas of archeological value and the DR requires that work stop immediately upon the discovery of any previously undiscovered cultural values. (FONSI/DR.) We recognize that there is some merit to SUWA's argument that a tractor driver may not recognize scatters of prehistoric potsherds. However, that is not evidence of a failure to consider a substantial environmental question but a difference of opinion as to the adequacy of the method of protecting cultural resources.

We also find no merit in SUWA's contention that chaining robs areas of their original character and transforms them into livestock feeding grounds which could affect the integrity of WSAs and wilderness eligible areas. It has provided no evidence to support its contention. The EA states that rehabilitation work will be "carried out to the extent feasible in a manner that would not impair wilderness suitability in accordance with the 'Interim Management Policy and Guidelines for Land under Wilderness.'" (EA at 5.) This includes using species native to the area to the extent feasible. Moreover, the EA recognizes that there are areas in the district included in proposed wilderness legislation and that, while these areas are non-BLM wilderness study areas, BLM policy is to identify such areas and "pay careful and particular attention to development proposals that could limit Congress' ability to designate certain BLM areas in Utah as wilderness areas." (EA at 9.)

We conclude that SUWA has failed to satisfy its burden of showing that BLM's environmental analysis was erroneous. The fact that SUWA would prefer a different course of action from that adopted by BLM does not establish error in BLM's decision. See Friends of the Bow, 139 IBLA at 150.

To the extent SUWA has raised arguments not addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

---

John H. Kelly  
Administrative Judge

I concur:

---

Gail M. Frazier  
Administrative Judge



